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In The

Supreme Court of the United States

October Term, 1991

WILLIAM W. PATY, HERBERT J. APAKA, JR., MOSES W. KEALOHA, J. DOUGLAS ING, JOHN ARISUMI, HERBERT ARATA, AND JOHN WAIHEE,

Petitioners,

vs.

DOCTOR NUI LOA PRICE, a.k.a. MAUI LOA, THE HOU HAWAIIANS, and KAMUELA PRICE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

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ARGUMENT

I. Review Should Be Granted, Particularly in Light of *Hunter v. Bryant*, No. 90-1440 (U.S. Dec. 16, 1991), to Correct the Panel's Erroneous Deferral of the Qualified Immunity Issue.

Respondents' argument that the issue of qualified immunity (Question 1) is not before the Court is plainly wrong on two separate levels. *First*, that issue *was* raised in the District Court (*see* Pet. at 13-15 & n.1), but was not reached for the sole reason that the District Court found

that no individual-capacity relief had been sought whatsoever. *See* Pet. App. 28-29. *Second*, irrespective of whether the issue was presented as a defense to be adjudicated upon the motion raised in the District Court, there is no dispute, nor can there be, that the defense was raised as an alternative ground for affirmance in the Court of Appeals. As the Court of Appeals noted, "the state officials argue that the facts which appear on this record make it clear that they are entitled to qualified immunity." Pet. App. 8.

This alone preserves the issue for review here, and requires reversal, or, at a minimum, vacatur and remand for further consideration in light of *Hunter v. Bryant*, 112 S. Ct. 534 (U.S. Dec. 16, 1991), a decision whose benefit the panel below did not have when it last acted in this case. *Hunter* directly answers the question resolved by the Ninth Circuit in its deferral of the immunity issue, and prohibits the sort of judicial wheel-spinning that the Ninth Circuit has required of Petitioners in this case. The Ninth Circuit's decision to subject Petitioners to yet another round of litigation in the District Court, with yet another round of appeals in the offing no matter how the immunity issue is decided there, is wholly at odds with this Court's emphatic insistence that immunity issues be resolved "at the earliest possible stage in the litigation." *Hunter*, 112 S. Ct. at 536.

At the very least, the Court should grant the Petition, vacate the judgment, and remand for further consideration in light of *Hunter v. Bryant*. Even if, *arguendo*, this case is not "free from all obstacles to reversal on an intervening precedent," this Court should still vacate and remand in that *Hunter* is "sufficiently analogous, and,

perhaps, decisive, to compel re-examination of the case." *Henry v. City of Rock Hill*, 376 U.S. 776, 776-77 (1964) (per curiam). Certiorari should thus be granted as to Question 1 of the Petition.[1]

II. Review Should Be Granted to Correct the Ninth Circuit's Assumption that Individual-Capacity Relief Was Sought.

Respondents also offer no good reason for refusing to grant review as to the question left unresolved by *Hafer v. Melo*, 112 S. Ct. 358, 361 n.* (1991). Respondents' only argument is that Petitioners' pleadings in the District Court made it "clear that they were aware that they were being sued in their individual capacities" (Resp. Br. 4). This is neither wholly true, nor, in any case, sufficient, to counsel denial of review. As Petitioners asserted (*see* Resp. Br. 1), and as the District Court *held*, the Complaint's "only reference to a suit against defendants in their official capacities was plaintiffs' prayer for 'judgment against Defendants jointly and severally.' " Pet. App. 29, and, therefore, "fail[s] to state a claim against the state defendants in their individual capacities." *Id.* This determination the Ninth Circuit erroneously rejected, thus exacerbating the inter-circuit conflicts this Court identified in *Hafer*. Assuming, *arguendo*, that the straightforward application of immunity does not end this case, this case plainly presents an appropriate vehicle for resolving those recurring conflicts. Indeed, because an

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[1] Respondents' argument that Petitioners were not performing discretionary functions (Resp. Br. 4) is answered by the ruling in *Davis v. Scherer*, 468 U.S. 183, 196-97 & n.14 (1984).

amendment of the Complaint (*see* Resp. Br. at 5) would be futile against the individual capacity defendants in light of the statute of limitations under Respondents *own* theory (*i.e.*, that the twenty-year limitations period applicable to adverse possession in Hawaii (Haw. Rev. Stat. § 657-31) applies here), the issue whether Petitioners were properly sued in their individual capacities presents a question "antecedent to [the merits] and ultimately dispositive of the present dispute." *Arcadia, Ohio v. Ohio Power Co.*, 111 S. Ct. 415, 416 (1990). Review should be granted as to the second Question.

III. Respondents Essentially Concede that the Third Question Presented – Relating to the Enforceability of Hawaii's Admission Act Via § 1983 – Merits the Granting of Review.

Respondents do not seriously dispute that whether Hawaii's admission act should be enforceable via 42 U.S.C. § 1983 is an issue that should be reviewed by this Court. They effectively conceded, in a previous amicus brief, that certiorari should be granted in this case if the Court deems the issues "important enough." *See* Brief of Amici Curiae, Hou Hawaiians, et al., No. 90-1937 (U.S. filed Aug. 23, 1991). Respondents readily agree, here, that "the nature and scope of the rights of native Hawaiians to sue to enforce the § 5(f) trust is a very important question of federal law that has not been but ought to be decided by this court" (Resp. Br. at 6). The Court should grant the Petition as to Question 3, or at least hold this Petition pending the disposition in the argued case, *Suter v. Artist M.*, No. 90-1488.

CONCLUSION

For the foregoing reasons and those stated in the Petition, the Court should grant the petition for certiorari. Because the Court of Appeals did not have the benefit of *Hunter v. Bryant*, 112 S. Ct. 534 (1991), the Court may wish to grant the petition, vacate the judgment, and remand for further consideration in light of *Hunter v. Bryant, supra*. Because of the relationship of Question 3 presented by the Petition to the issues in *Suter v. Artist M.*, No. 90-1488, the Court should at the least hold this Petition pending the disposition in No. 90-1488.

Dated: Honolulu, Hawaii, March 12, 1992.

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